Supreme Court, U.S.
FILED
MAR 6 1996
CLERK

(2)

No. 95-878

# In the Supreme Court of the United States

OCTOBER TERM, 1995

PRODUCTION PLATED PLASTICS, INC., ET AL.,
PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
*Solicitor General*

LOIS J. SCHIFFER
*Assistant Attorney General*

ANNE ALMY
GREGORY L. SUKYS
MARTIN W. MATZEN
ELINOR COLBOURN
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

## QUESTIONS PRESENTED

1. Whether the district court violated the Due Process Clause of the Fifth Amendment by holding a corporate officer and two corporations jointly and severally liable for a civil penalty of $1.5 million for violations of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, based on the court's assessment of the role of each of those parties in the violations.

2. Whether the civil penalty imposed by the district court violated the Excessive Fines Clause of the Eighth Amendment, when it was only a fraction of the maximum penalty authorized by the statute and comparable to penalties imposed in similar cases.

3. Whether the law of the case doctrine barred petitioner Ladney from relitigating the prior determination that he was liable under RCRA as an "operator" of a hazardous waste facility.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 7 |
| Conclusion | 19 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144 (1970) | 16 |
| *Coal Resources, Inc.* v. *Gulf & Western Indus., Inc.*, 865 F.2d 761, amended on denial of reh'g, 877 F.2d 5 (6th Cir. 1989) | 14 |
| *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656 (1987) | 12 |
| *Joslyn Mfg. Co.* v. *T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990), cert. denied, 498 U.S. 1108 (1991) | 17 |
| *Kelley ex rel. Michigan Natural Resources Comm'n* v. *Tiscornia*, 827 F. Supp. 1315 (W.D. Mich. 1993) | 14, 15 |
| *Kori Corp.* v. *Wilco Marsh Buggies & Draglines, Inc.*, 761 F.2d 649 (Fed. Cir.), cert. denied, 474 U.S. 902 (1985) | 14 |
| *New York* v. *Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985) | 15, 17 |
| *Northside Sanitary Landfill, Inc.* v. *Thomas*, 804 F.2d 371 (7th Cir. 1986) | 3-4 |
| *Production Plated Plastics, Inc.* v. *United States*, 506 U.S. 820 (1992) | 3, 5 |
| *Riverside Market Development Corp.* v. *International Building Prods., Inc.*, 931 F.2d 327 (5th Cir.), cert. denied, 502 U.S. 1004 (1991) | 17 |
| *Taylor* v. *Freeland & Kronz*, 503 U.S. 638 (1992) | 16 |

Cases—Continued: Page

*United States* v. *Allegan Metal Finishing Co.*, 696 F. Supp. 275 (W.D. Mich. 1988), appeal dismissed, 867 F.2d 611 (6th Cir. 1989) ..... 12
*United States* v. *Bethlehem Steel Corp.*, 829 F. Supp. 1047 (N.D. Ind. 1993) ..... 10
*United States* v. *Conservation Chemical Co.*, 733 F. Supp. 1215 (N.D. Ind. 1989) ..... 18
*United States* v. *Cordova Chemical Co.*, 59 F.3d 584, vacated and rehearing en banc granted, 67 F.3d 586 (6th Cir. 1995) ..... 14, 15
*United States* v. *Ekco Housewares, Inc.*, 62 F.3d 806 (6th Cir. 1995) ..... 10, 12
*United States* v. *Environmental Waste Control, Inc.*, 698 F. Supp. 1422 (N.D. Ind. 1988) ..... 18
*United States* v. *Lacks Indus., Inc.*, 32 ERC 1221 (W.D. Mich. 1990) ..... 12
*United States* v. *Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987) ..... 16, 17
*United States* v. *T&S Brass & Bronze Works, Inc.*, 681 F. Supp. 314 (D.S.C.), aff'd in part, vacated in part, and remanded in part, 865 F.2d 1261 (4th Cir. 1988) ..... 12
*United States Environmental Protection Agency* v. *Environmental Waste Control, Inc.*, 710 F. Supp. 1172 (N.D. Ind. 1989), aff'd, 917 F.2d 327 (7th Cir. 1990), cert. denied, 499 U.S. 975 (1991) ..... 12
*Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979) ..... 18

Constitution, statutes and regulation:

U.S. Const.:
Amend. V (Due Process Clause) ..... 6, 7
Amend. VIII (Excessive Fines Clause) ..... 7, 10

Statutes and regulation—Continued: Page

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.* ..... 3, 16-17
42 U.S.C. 9607 ..... 17
42 U.S.C. 9607(a) ..... 17
Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 ..... 4
Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.* ..... 2
§ 1003(b), 42 U.S.C. 6902(b) ..... 3
§ 3005, 42 U.S.C. 6925 ..... 3
§ 3005(a), 42 U.S.C. 6925(a) ..... 18
§ 3005(e), 42 U.S.C. 6925(e) ..... 3
§ 3005(e)(2), 42 U.S.C. 6925(e)(2) ..... 4, 5
§ 3008(e), 42 U.S.C. 6928(e) ..... 10
§ 7003, 42 U.S.C. 6973 ..... 17
1 U.S.C. 1 ..... 18
Michigan Hazardous Waste Management Act, Mich. Comp. Laws Ann. § 299.548 (West 1984) (repealed) ..... 2
40 C.F.R. 260.3(b) ..... 18

# In the Supreme Court of the United States

OCTOBER TERM, 1995

---

No. 95-878

PRODUCTION PLATED PLASTICS, INC., ET AL.,
PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is unpublished, but the judgment is noted at 61 F.3d 904 (Table). The district court's opinion (Pet. App. 61-84), its order appointing a trustee (Pet. App. 85-95), and its memorandum regarding the appointment (Pet. App. 99-128) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on July 19, 1995. The petition for a writ of certiorari was filed on October 17, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

This is an enforcement action brought by the United States, on behalf of the Environmental Protection Agency (EPA), and the Michigan Department of Natural Resources (MDNR) for violations of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, and the Michigan Hazardous Waste Management Act (HWMA), Mich. Comp. Laws Ann. § 299.548 (West 1984) (repealed).[1] The violations occurred at a hazardous waste facility in Richland, Michigan. Petitioners are Production Plated Plastics, Inc. (PPP), a Michigan corporation that molded, electroplated, and painted plastic automobile parts at the Richland facility; Michigan City Plastics Co. (MCP), an Indiana corporation that owns all of PPP's stock; and Michael Ladney, who owns 68% of MCP's stock and has at all relevant times served as president of both PPP and MCP. Pet. App. 33-34, 44.

In a prior proceeding, the district court granted partial summary judgment holding petitioners jointly and severally liable for violations of RCRA. Pet. App. 21-37. The court later granted partial summary judgment on certain remedial issues and entered a permanent injunction requiring petitioners to close the hazardous waste land disposal units of the Richland facility in accordance with closure plans approved by MDNR. *Id.* at 38-60. The court of appeals affirmed those rulings, *id.* at 18-20, and this Court

---

[1] In relevant respects, the requirements of HWMA are similar to those of RCRA. For the sake of simplicity, hereafter we refer to them collectively as "RCRA."

denied petitioners' petition for a writ of certiorari, 506 U.S. 820 (1992).

In the proceeding to which the instant petition relates, the district court ordered petitioners, jointly and severally, to comply with the previous injunction, comply with the groundwater monitoring requirements of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, and pay a $1.5 million civil penalty. Pet. App. 61-80. When petitioners failed to comply with the injunction within the time period specified by the court, the court appointed a receiver to marshal the assets of petitioners necessary for achieving compliance with the court's order. *Id.* at 85-95. The court of appeals affirmed. *Id.* at 1-17.

1. RCRA established a comprehensive federal program governing the generation, transportation, storage, treatment, and disposal of hazardous wastes, in order "to minimize the present and future threat to human health and the environment." 42 U.S.C. 6902(b). Section 3005 of RCRA, 42 U.S.C. 6925, requires that every hazardous waste facility have a permit to operate. Recognizing that EPA could not issue permits to all applicants before the effective date of the relevant portions of RCRA, Congress provided that facilities in existence on November 19, 1980, could obtain "interim status," allowing them to continue to operate until final action was taken on their permit applications. 42 U.S.C. 6925(e). Interim status was automatically granted to any facility that filed a "Part A" permit application, and allowed such a facility to continue operating until EPA took final action on the facility's subsequent "Part B" permit application. *Ibid.*; see Pet. App. 23-24; see also *North-*

*side Sanitary Landfill, Inc.* v. *Thomas*, 804 F.2d 371, 373-374 (7th Cir. 1986).

By the November 15, 1980, deadline, petitioners submitted to EPA a "Notice of Hazardous Waste Activities" and a Part A permit application, thereby securing interim status. Pet. App. 23. The submissions "identified 5,955 tons of listed hazardous waste in surface impoundments and a waste pile at the Richland facility." *Id.* at 44. Petitioner Ladney signed the Part A permit application and identified himself as the owner and operator of the Richland facility. *Id.* at 33. Similarly, in the Notification he identified himself as the facility's "legal owner." *Id.* at 23. More than four years later, petitioners submitted a revised Part A permit application listing PPP as the legal owner of the Richland facility. *Id.* at 24.

2. In 1984, responding to concerns about widespread groundwater contamination from interim status facilities, Congress amended RCRA to provide for Loss of Interim Status (LOIS).[2] The LOIS amendment required every land disposal facility granted interim status before November 8, 1984, to submit a completed Part B permit application before November 8, 1985, and to certify that it was "in compliance with applicable groundwater monitoring and financial responsibility requirements." 42 U.S.C. 6925(e)(2). Any land disposal facility that failed to meet those requirements automatically lost its interim status as of November 8, 1985, and the owners

---

[2] RCRA § 3005(e)(2), 42 U.S.C. 6925(e)(2). The LOIS provision was one of a number of amendments Congress made to RCRA in 1984, which were known collectively as the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221.

and operators of the facility were required to submit a closure plan to EPA within 15 days and to close the facility within 180 days after EPA's approval of the closure plan. Pet. App. 27, 41-42.

In July 1984, petitioners submitted a deficient Part B permit application; in addition, they later acknowledged that they could not comply with RCRA's financial responsibility requirements. Pet. 5; Pet. App. 44. Accordingly, "as a matter of law," the Richland facility "lost its interim status as of November 8, 1985," under 42 U.S.C. 6925(e)(2). Pet. App. 19, 28. Nevertheless, petitioners continued to operate the facility without a permit for more than two years, until December 1987. They failed to submit a closure plan within the time period prescribed in RCRA, and they failed to implement the closure plan that was eventually approved by MDNR in 1988. *Ibid.*

The district court held that petitioners' continued operation of the Richland facility and their failure to submit or implement a timely closure plan, among other conduct, violated RCRA. Pet. App. 21-37. In a subsequent order, the court entered a permanent injunction requiring petitioners to implement closure plans previously approved by MDNR. *Id.* at 38-60. The court of appeals affirmed both rulings in an unpublished opinion. *Id.* at 18-20.

Petitioners petitioned for a writ of certiorari solely on the issue whether petitioner Ladney could be held liable as an "operator" of the Richland facility. This Court denied the petition. *Production Plated Plastics, Inc.* v. *United States*, 506 U.S. 820 (1992).

3. On remand, the district court held a 14-day bench trial on respondents' claims for civil penalties and the United States' motion to enforce the permanent injunction. The court found, *inter alia*, that (1)

petitioner Ladney controlled the world's largest privately owned plastic molding injection consortium—the Detroit Plastic Molding or "DPM" Group (Pet. App. 63-64)—which included MCP and PPP; (2) Ladney commingled his assets with those of MCP, PPP, and the other companies in the DPM Group, and treated the companies as a single entity under his control (*ibid.*); (3) petitioners realized an "economic benefit of at least $1 million through their failure to timely comply with [RCRA]" (*id.* at 72); (4) petitioners "have had and continue to have the financial ability to comply with RCRA and to pay a meaningful penalty for their noncompliance" (*ibid.*); and (5) petitioners had violated the permanent injunction (*id.* at 74-75). The court assessed a civil penalty of $1.5 million, which, it found, was "in line with those imposed in numerous other environmental cases." *Id.* at 79. Finally, the court warned that, if petitioners did not comply with the injunction within 90 days, the court would appoint a receiver to "expeditiously liquidate whatever assets are necessary to provide funds for compliance" with the court's injunction. *Id.* at 76. Petitioners did not comply within that period, and the court accordingly appointed a receiver on December 10, 1993. *Id.* at 85-127.

4. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-17. It rejected petitioners' contention that the Due Process Clause of the Fifth Amendment required the civil penalty to be based on a separate assessment of each petitioner's conduct. *Id.* at 7-8. The court held that such a determination would not have been appropriate in this case in light of the district court's finding that petitioners "functioned as one entity." *Id.* at 8. The court of appeals also rejected petitioners' claim that the $1.5 million

civil penalty violated the Excessive Fines Clause of the Eighth Amendment. *Id.* at 9-10. "Assuming without holding that a RCRA civil penalty is subject to the Excessive Fines Clause," the court held that the penalty imposed on petitioners was not excessive. *Id.* at 10. It observed that the penalty was based on the district court's consideration of factors identified as relevant in other cases and was far below the maximum penalty of $90 million prescribed by the statute. *Id.* at 9-10. Finally, as relevant here, the court of appeals held that the law of the case doctrine precluded consideration of "the district court's earlier finding of joint and several liability for RCRA compliance." *Id.* at 6.[3]

**ARGUMENT**

1. Petitioners contend (Pet. 11-15) that the district court violated the Due Process Clause of the Fifth Amendment by failing to assess each petitioner's conduct before imposing joint and several liability for a civil penalty under RCRA. Petitioners acknowledge that there is no case law, much less a conflict among the courts, on whether due process imposes such a requirement. Pet. 11 & n.8. For that reason alone, the issue would not warrant further review. In any event, this case does not present the issue, because the district court *did* evaluate the actions of each petitioner and the relationship among them.

---

[3] In other rulings that petitioners do not challenge in this Court, the court of appeals held that the district court did not err in refusing to reduce the penalty to reflect the government's settlement with petitioner Ladney's former wife (Pet. App. 11-12); in establishing a groundwater monitoring trust fund (*id.* at 12-13); or in appointing a receiver (*id.* at 14-17).

With regard to petitioner PPP, the district court held, in rulings affirmed by the court of appeals, that PPP violated RCRA by failing to certify compliance with the financial responsibility requirements of RCRA; failing to meet RCRA deadlines for having a permit for land disposal units and adequate underground monitoring; and failing to close the Richland facility when it lost its interim status in November 1985. Pet. App. 28, 70. The court also found that, after losing its interim status, PPP continued to operate the facility without a permit for more than two years, until December 1987, and failed to submit a timely closure plan or to implement the closure plan approved by MDNR in 1988. *Ibid.*

Moreover, petitioners stipulated that PPP and MCP were jointly liable for the RCRA violations. Pet. App. 57 n.2.[4] Indeed, as the district court noted, petitioners argued at one point that the companies in the DPM Group, which included PPP and MCP, "were all alter egos of one another." *Id.* at 64 n.3.

The district court also made findings regarding petitioner Ladney that justified holding him jointly and severally liable for the civil penalty. In its decision on the liability issue in the prior proceeding, the court found that petitioner Ladney's own affidavit established that, as president of PPP, he had "the ultimate decision-making authority" for that entity.

---

[4] In light of that stipulation, although petitioners purport to reserve a challenge to the underlying finding that they are jointly and severally liable for the RCRA violations, Pet. 11 n.7, they are precluded from challenging the joint liability of PPP and MCP. Moreover, as discussed *infra*, the court of appeals correctly held that petitioners were barred by the law of the case doctrine from challenging petitioner Ladney's joint and several liability.

Pet. App. 34. The court also found that he "was actively involved in the day-to-day operations of PPP." *Ibid.* In particular, the court found that he was "personally involved in or directly responsible for the acts in violation of RCRA and HWMA." *Id.* at 33-34.[5] In its opinion assessing the civil penalty, the court further found that Ladney owned and completely controlled the DPM Group, including PPP and MCP, "as a single corporate entity" (*id.* at 63); that his personal assets were "commingled" with those of his corporations (*id.* at 64); and that assets within the corporate group "were channelled wherever they were needed without regard to the corporate form" (*ibid.*).

The district court made other individualized findings to support its assessment of the civil penalty. It examined the assets of each petitioner to determine the ability of each to pay the penalty. Pet. App. 72-74. It also considered mitigating and exacerbating factors common to petitioners and the total economic benefit to petitioners flowing from the violations. *Id.* at 76-78.

Thus, there is no basis in law or fact for petitioners' assertion that they were not accorded due process.

---

[5] The court's findings were based on, *inter alia*, evidence that: petitioner Ladney was president of PPP at all relevant times; was listed as the owner and operator of the Richland facility on the original Part A application; personally attested to PPP's environmental cleanup efforts in a state court lawsuit brought by MDNR, asserting "firsthand knowledge" of operations of the very sort that were later required by the permanent injunction; and kept in regular telephone contact with the plant manager of PPP. See Pet. App. 34; see also, *e.g.*, C.A. App. 175, 353.

2. Petitioners next contend (Pet. 14-22) that the civil penalty violated the Excessive Fines Clause of the Eighth Amendment. The court of appeals correctly held that, even if it is assumed that civil penalties under RCRA are subject to that Clause, the penalty of $1.5 million imposed in this case was not excessive. Pet. App. 9-10.

Petitioners do not take issue with the factors upon which the district court based the amount of the penalty, which have been cited as relevant in numerous other cases. Pet. App. 76-78; see also *United States* v. *Ekco Housewares, Inc.*, 62 F.3d 806, 814 (6th Cir. 1995); *United States* v. *Bethlehem Steel Corp.*, 829 F. Supp. 1047, 1055 (N.D. Ind. 1993) (collecting cases). Thus, petitioners acknowledge that the district court properly considered the maximum penalties authorized by statute (Pet. 16), the gravity of the violations (Pet. 18), and the penalties in comparable cases (Pet. 20-21). Petitioners' largely factbound challenge to the district court's evaluation of those factors does not warrant further review.

Petitioners acknowledge that, as the district court found, they were subject to a maximum civil penalty of $92 million under RCRA. Pet. 16. They argue, however, that the district court erred in considering that figure because "the statutory cap for *criminal* violations" of RCRA is $250,000. *Ibid.* (emphasis added). Petitioners are incorrect. The RCRA provision that they cite provides for a maximum penalty, for each criminal violation, of "not more than $250,000 or imprisonment for not more than fifteen years, or both," for a "person," and "a fine of not more than $1,000,000" for "an organization." 42 U.S.C. 6928(e). Petitioners do not explain why the civil penalty imposed on them for multiple violations of RCRA should

be compared to the maximum amount of the fine (but not the maximum period of imprisonment) prescribed for "persons" (but not "organization[s]") found guilty of a single (not multiple) criminal (not civil) violation of RCRA.[6]

The district court held, in a ruling that the court of appeals did not disturb, that "the harm posed by [petitioners' RCRA] violations is serious and the scope of the violations is extensive." Pet. App. 77. Petitioners' challenge to that holding (Pet. 18-19) merely reflects disagreement with certain findings of fact made by the district court after the 14-day trial and affirmed by the court of appeals. See Pet. App. 66-71, 74-75.[7] Petitioners provide no reason for this Court to depart from its practice of not reviewing such

---

[6] Nor do petitioners cite any support for their contention (Pet. 17) that a civil RCRA penalty of more than $250,000 can be imposed only if the violator profited by more than that amount. In any event, the district court found that petitioners received an economic benefit of at least $1 million from their violations. Pet. App. 72. Petitioners do not dispute that finding, which was based on expert testimony that the district court found "highly credible." *Ibid.*

[7] For example, petitioners assert that, while the surface impoundments at the Richland facility "may have been a *minor* cause of the groundwater degradation, they were not a significant source of the groundwater contamination." Pet. 18. The district court found, however, that monitoring wells near the impoundments showed chromium levels ranging from 53 parts per billion (ppb) to 2,350 ppb between May 1980 and June 1983, and that the same wells showed levels of nickel contamination ranging from 170 ppb to 1,660 ppb between March 1980 and January 1984. Pet. App. 66-67. The court also found that concentrations of chromium and nickel exceeding 100 ppb are considered unsafe and overexposure is associated with kidney and liver damage. *Id.* at 66 & n.6.

challenges. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

Both the district court and the court of appeals determined that the civil penalty of approximately $400 for each day that petitioners were in violation of RCRA was well within the range of fines imposed in similar cases. Pet. App. 9-10 (citing *United States Environmental Protection Agency* v. *Environmental Waste Control, Inc.*, 710 F. Supp. 1172, 1242-1245 (N.D. Ind. 1989) (imposing RCRA civil penalty of $2,000 per day for total of $2,778,000), aff'd, 917 F.2d 327 (7th Cir. 1990), cert. denied, 499 U.S. 975 (1991); *United States* v. *T & S Brass & Bronze Works, Inc.*, 681 F. Supp. 314, 322 (D.S.C.) (imposing RCRA civil penalty of $1,000 per day for total of $194,000), aff'd in part, vacated in part on other grounds, and remanded in part, 865 F.2d 1261 (4th Cir. 1988) (Table)); see also *Ekco Housewares*, 62 F.3d at 817 n.9 (RCRA civil penalty of $1,000 per day was not disproportionate). The two decisions cited by petitioners (Pet. 21) as imposing lower penalties are distinguishable.[8]

Petitioners' assertion (Pet. 17) that they lack sufficient assets to pay the penalty and properly close the

---

[8] The penalty in *United States* v. *Allegan Metal Finishing Co.*, 696 F. Supp. 275 (W.D. Mich. 1988), appeal dismissed, 867 F.2d 611 (6th Cir. 1989) (Table), was imposed under a Consent Agreement and Final Order entered in an administrative case and therefore is not comparable to this case. See *Ekco Housewares*, 62 F.3d at 817 (reliance on administrative cases for penalty comparisons to district court case misplaced). The court in *United States* v. *Lacks Indus., Inc.*, 32 ERC 1221 (W.D. Mich. 1990), determined that the RCRA violations did not result in serious harm to the environment and were to some extent the result of representations to the defendant company by state officials that the company was not subject to RCRA.

Richland facility is unfounded. The district court found that while PPP now has no assets—$2.8 million in assets having been "channelled away from PPP into other DPM Group corporations" (Pet. App. 73)—MCP owned a piece of property worth approximately $1.4 million. *Id.* at 72-74. The court also found that petitioner Ladney's assets include not only the Canadian property to which the petition refers (Pet. 22 n.31), which is valued at $3.4-3.9 million, but also a $1.5 million home, a factory and land valued at $1 million, land in Ohio valued at $1-1.5 million, 99% ownership of the Milad partnership with a gross income of $875,000, and annual personal income totalling about $200,000. Pet. App. 72-74. Petitioners do not contest the district court's findings as to the existence and value of petitioners' assets.[9] In light of those findings, the district court reasonably determined that, "[w]hile the penalty is certainly large enough to hurt, there is no danger that the funds necessary for final closure will not be available or that defendants will not be able to pay the penalty imposed." *Id.* at 78.

3. Finally, petitioners contend (Pet. 22-29) that the courts below should have reconsidered their prior determination that petitioner Ladney was jointly and severally liable for the RCRA violations. Petitioners do not dispute that the law of the case doctrine barred reconsideration of that issue in the absence of exceptional circumstances. See Pet. 22. The courts have specified three such circumstances:

> The [law of the case] doctrine precludes * * * reconsideration of the [previously decided issue]

---

[9] But see Pet. 22 n.31, 23 (stating, without support, that petitioner Ladney's income is $150,000, and that his net worth is $500,000).

> unless * * * the evidence in a subsequent trial was substantially different; controlling authority has since made a contrary decision of law applicable to such issues; or the decision was clearly erroneous, and would work a substantial injustice.

*Coal Resources, Inc.* v. *Gulf & Western Indus., Inc.*, 865 F.2d 761, 767 (quoting *Kori Corp.* v. *Wilco Marsh Buggies & Draglines, Inc.*, 761 F.2d 649, 657 (Fed. Cir.), cert. denied, 474 U.S. 902 (1985)), amended on other grounds on denial of reh'g, 877 F.2d 5 (6th Cir. 1989). Contrary to petitioners' contention (Pet. 22), none of those circumstances was present here.

a. The only new fact to which petitioners refer (Pet. 23) is that the State of Michigan took over the PPP property in 1991 for nonpayment of taxes. Pet. App. 67. That fact has no bearing on whether petitioner Ladney was properly held personally liable under RCRA. Petitioners suggest that it may affect their ability to comply with the court's order requiring closure of the Richland facility and other actions on the site. Pet. 23. Since the State is one of the parties that sought that order, however, there is no reason to believe that the State will impede petitioners' efforts to comply with the order.

b. Petitioners err in asserting (Pet. 22-23) that the relevant legal principles have changed since petitioner Ladney's liability was determined. In support of that assertion, they rely primarily on *Kelley ex rel. Michigan Natural Resources Comm'n* v. *Tiscornia*, 827 F. Supp. 1315 (W.D. Mich. 1993).[10] It is

---

[10] Petitioners also cite *United States* v. *Cordova Chemical Co.*, 59 F.3d 584, 590 (6th Cir. 1995). On the government's petition for rehearing in that case, however, the panel judgment was

axiomatic, however, that a district court decision is not controlling authority even within that district.

In any event, *Kelley* does not cast doubt on the prior determination of petitioner Ladney's liability. Petitioners mischaracterize *Kelley* as holding that corporate officers may be personally liable under RCRA only "if they would have been liable under common law for personal tortious acts." Pet. 22. Instead, *Kelley* adopted the "active participation" test set forth in *New York* v. *Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985), for determining the personal liability of a corporate officer:

> Using this standard, the Court must decide whether, as a matter of law, the * * * defendants participated actively in the waste handling practices * * *. Active participation is not limited to actual disposal, but extends to decisionmaking and supervision such that an officer could be considered an active individual participant in the unlawful conduct.

*Kelley*, 827 F. Supp. at 1324-1325. That is precisely the analysis endorsed by petitioners and used by the district court in holding that petitioner Ladney was personally liable for the RCRA violations in this case. See p. 16, *infra*.

c. Petitioners claim (Pet. 23-29) that it was manifestly unjust to hold petitioner Ladney personally liable for the RCRA violations. In support of that claim, they contend (Pet. 25-29) that a corporate officer cannot be held personally liable for RCRA violations at a facility owned by a corporation. Peti-

---

vacated and rehearing en banc has been granted. *United States* v. *Cordova Chemical Co.*, 67 F.3d 586 (6th Cir. 1995).

tioners advanced the same contention in their prior petition for a writ of certiorari. Petition for a Writ of Certiorari at 11-23, *Production Plated Plastics, Inc.* v. *United States* (*PPP*) (No. 91-1869). As the government explained in its opposition to the prior petition, however, petitioners did not advance the contention in the district court. Brief for the United States in Opposition at 6, *PPP* (No. 91-1869). Instead, in the district court petitioners acknowledged that Ladney could be held personally liable under RCRA if he "play[ed] an active role in controlling the waste management policies and practices of PPP."[11] The district court applied that standard in holding that Ladney was personally liable. See Pet. App. 32-34. Thus, petitioners' later contention that corporate officers are immune from liability for RCRA violations, even under an "active control" standard, was not properly before this Court in the prior petition and for the same reason is not properly presented in the instant petition. See, *e.g.*, *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, petitioners' contention lacks merit. Petitioners concede (Pet. 24) that the federal courts have consistently held that individuals—and not just the corporations of which they are officers, shareholders, or employees—may be held personally liable for violations of RCRA, as well as for violations of the analogous (but not identical) provisions of the Comprehensive Environmental Response, Compensa-

---

[11] Defs.' Memo. in Opp. to Pls.' Mot. for Summ. J. (C.A. App. 283) (citing *United States* v. *Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987)).

tion, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.* See, *e.g.*, *United States* v. *Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 743-745 (8th Cir. 1986) (individual liability under RCRA, 42 U.S.C. 6973, and CERCLA, 42 U.S.C. 9607), cert. denied, 484 U.S. 848 (1987); *Shore Realty Corp.*, 759 F.2d at 1052 (individual liability under CERCLA, 42 U.S.C. 9607).

The sole exception, according to petitioners (Pet. 25), is *Joslyn Mfg. Co.* v. *T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990), cert. denied, 498 U.S. 1108 (1991), a CERCLA case.[12] Petitioners' reliance on *Joslyn* is misplaced. In that case, the Fifth Circuit declined to hold a parent company vicariously liable for violations by its subsidiary. *Id.* at 83-84. The court did not address the quite different issue whether a parent company may be held liable for its *own* actions, which is the issue here. Furthermore, the Fifth Circuit stated in a later decision that "CERCLA prevents individuals from hiding behind the corporate shield when, as 'operators,' they themselves actually participate in the wrongful conduct prohibited by the Act." *Riverside Market Development Corp.* v. *International Building Prods., Inc.*, 931 F.2d 327, 330 (citing CERCLA, 42 U.S.C. 9607(a)), cert. denied, 502 U.S. 1004 (1991). In light of the similarity between CERCLA and RCRA, that statement makes clear that the Fifth Circuit would reject petitioners' contention that a corporate officer may never be held personally liable for RCRA violations at a corporation-owned facility.

---

[12] The only other decision cited (Pet. 25 n.41) by petitioners, *United States* v. *Cordova Chemical Co.*, has been vacated pending en banc review. See note 10, *supra*.

Petitioners argue (Pet. 25-26) that the text of RCRA compels the conclusion that for a given hazardous waste facility there can be only a single "operator," which must be the "owner" of that facility. It is well settled that the use of the singular form in a statute ordinarily should be construed to include the plural. 1 U.S.C. 1; *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 665 (1979); see also 40 C.F.R. 260.3(b) (same principle applies to EPA regulations implementing RCRA). That principle is fully applicable to the references to "owner" and "operator" in RCRA. Accordingly, the courts have consistently and correctly rejected the argument that there can be only a single "operator" under RCRA and CERCLA. See pp. 16-17, *supra*; see also *United States* v. *Environmental Waste Control, Inc.*, 698 F. Supp. 1422, 1428-1429 (N.D. Ind. 1988); *United States* v. *Conservation Chemical Co.*, 733 F. Supp. 1215, 1221 (N.D. Ind. 1989).

Petitioners err in asserting (Pet. 27) that interpreting the terms "owner" and "operator" to include the plural would lead to the "absurd" result that RCRA would require multiple permits (one for each "owner" or "operator") for a single hazardous waste facility. Instead, the statute is most naturally read to make each owner and operator responsible for obtaining a single permit for the facility. 42 U.S.C. 6925(a). That is hardly an absurd result.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
*Solicitor General*

LOIS J. SCHIFFER
*Assistant Attorney General*

ANNE ALMY
GREGORY L. SUKYS
MARTIN W. MATZEN
ELINOR COLBOURN
*Attorneys*

MARCH 1996